

DEPARTMENT OF LABOR

29 CFR Part 270

RIN 1294-AA13

**Office of the American Workplace;
Permanent Replacement of Lawfully
Striking Employees by Federal
Contractors****AGENCY:** Office of the American Workplace, Labor.**ACTION:** Notice of proposed rulemaking.

SUMMARY: This notice of proposed rulemaking sets forth proposed regulations for implementing Executive Order 12954, which was signed by President Clinton on March 8, 1995 and became effective on that date, and was published in the **Federal Register** on March 10, 1995. Executive Order 12954 provides that in procuring goods and services, in order to ensure the economical and efficient administration and completion of contracts, federal contracting agencies shall not contract with employers that permanently replace lawfully striking employees.

DATES: Interested parties may submit written comments on this proposal by April 28, 1995.

ADDRESSES: Written comments should be submitted to the Office of the American Workplace, U.S. Department of Labor, 200 Constitution Avenue NW., Room S-2203, Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Charles L. Smith, Special Assistant to the Deputy Secretary, Office of the American Workplace, U.S. Department of Labor, 200 Constitution Avenue NW., Room S-2203, Washington, DC 20210, (202) 219-6045. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: On March 8, 1995, President Clinton signed Executive Order 12954, "Ensuring the Economical and Efficient Administration and Completion of Federal Government Contracts." In the Order, the President makes the finding that economy and efficiency in procurement are generally advanced by contracting with employers that do not permanently replace lawfully striking employees. That is, the permanent replacement of strikers can adversely affect a contractor's ability to reliably provide high quality goods and services, thereby adversely affecting the Federal Government's economy, efficiency, and cost of operations. The Order then states that "[i]t is the policy of the executive branch in procuring goods and services that, to ensure the economical and efficient administration and completion of Federal Government contracts,

contracting agencies shall not contract with employers that permanently replace lawfully striking employees." The Order further states that all discretion under the Order is to be exercised in accordance with this policy.

The Order then establishes a flexible mechanism, based on case-by-case determinations, designed to ensure economy and efficiency in government procurement involving contractors that have permanently replaced lawfully striking employees. Under the Order, the Secretary of Labor is authorized to conduct investigations, either on the basis of a complaint or on his or her own initiative, and to hold hearings as he or she deems advisable in order to determine whether an organizational unit of a federal contractor has permanently replaced lawfully striking employees.

If the Secretary finds that an organizational unit of a federal contractor has permanently replaced lawfully striking employees, he or she may exercise either or both of two options. First, he or she may find that existing contracts should be terminated for convenience; the head of the contracting agency may object to that finding in writing and the termination for convenience shall not be issued.

Second, the Secretary may find that it is appropriate to debar the employer from future contracts and renewal of existing contracts until the labor dispute is resolved. However, a contracting agency may enter into a contract with the employer if there is a compelling reason to do so.

The Secretary has delegated his authority under the Order to the Assistant Secretary for the American Workplace in Secretary's Order No. 2-95, signed on March 8, 1995, and published in the **Federal Register** on March 13, 1995, 60 FR 13602.

Administrative Notices**A. Executive Order 12866**

The Department of Labor has determined that this rule is a significant regulatory action as defined in section 3(f) of Executive Order 12866. The Department is issuing this rule in conformance with that Executive Order. The Department has determined that the potential benefits of this regulatory action outweigh the potential costs, and that the rule promotes the President's priorities. This rule does not meet the criteria of section 3(f)(1) of Executive Order 12866 and, therefore, the information in section 6(a)(3)(C) of that Executive Order is not required. This

rule has been reviewed by the Office of Management and Budget.

B. Regulatory Flexibility Act

The Agency Head has certified that this rule is not expected to have a significant impact on a substantial number of small entities as defined in the Regulatory Flexibility Act.

C. Paperwork Reduction Act

This rule contains no information collection requirements for purposes of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

List of Subjects in 29 CFR Part 270

Administrative practice and procedure; Government contracts; Federal contractors and subcontractors.

Signed at Washington, D.C., this 24th day of March, 1995.

Charles L. Smith,*Special Assistant to the Deputy Secretary.*

Accordingly, it is proposed to amend 29 CFR Chapter II by adding a new Part 270 as set forth below.

**PART 270—OBLIGATIONS OF
FEDERAL CONTRACTING AGENCIES:
PERMANENT REPLACEMENT OF
LAWFULLY STRIKING EMPLOYEES****Subpart A—Preliminary Matters**

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Authority: Executive Order No. 12954, 60 FR 13023, March 10, 1995; Secretary's Order No. 2-95, 60 FR 13602, March 13, 1995.

Subpart A—Preliminary Matters**§ 270.1 Definitions.**

(a) *Affiliates* means business concerns, organizations, or individuals among which, directly or indirectly, either one controls or has the power to control the other, or a third party controls or has the power to control both. Indicia of control include, but are not limited to, interlocking management

or ownership, identity of interest among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment.

(b) *Assistant Secretary* means the Assistant Secretary of Labor for the American Workplace.

(c) *Contract* means a mutually binding agreement between the Government as a buyer, represented by a contracting agency, and a seller, where the seller agrees to furnish supplies or services (including construction) and the Government agrees to pay for them. It includes job orders or task orders issued under basic ordering agreements; letter contracts; orders, such as purchase orders under which the contract becomes effective by written acceptance or performance; and bilateral modifications to a contract, which increase the supplies or services to be delivered under the contract. For purposes of this part a contract is limited to agreements in which the Government agrees to pay an amount in excess of the Simplified Acquisition Threshold of \$100,000 specified in section 4(11) of the Office of Federal Procurement Policy Act, 41 U.S.C. 403(11). The term "contract" does not include agreements in which the parties stand in the relationship of employer and employee.

(d) *Contracting agency* means any executive department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation.

(e) *Contractor* means a prime contractor.

(f) *Department* means the U.S. Department of Labor.

(g) *Deputy Assistant Secretary* means the Deputy Assistant Secretary for Labor-Management Programs, Office of the American Workplace, U.S. Department of Labor.

(h) *Employee* includes any employee of an employer, and includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, but does not include any individual having the status of an independent contractor or any individual employed as a supervisor.

(i) *Government* means the government of the United States of America.

(j) *Labor dispute* includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or

representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(k) *Lawfully striking employee* means an employee who is engaged in a strike that has not been finally adjudicated to be unlawful under any applicable federal, state, or local law.

(l) *Order* means Executive Order 12954, dated March 8, 1995 (60 FR 13023, March 10, 1995).

(m) *Organizational unit of a federal contractor includes:*

(1) A division or other organizational element of a person that is responsible as the prime contractor for performing a contract, and (2) Any other affiliate of the person that could provide the goods or services required to be provided under the contract.

(n) *Permanently replaced*, when used in connection with a lawfully striking employee, means that during a lawful strike the employer has placed an individual in the lawfully striking employee's position, and the striking employee does not have an unconditional right to reinstatement.

(o) *Person* means any natural person, corporation, partnership or joint venture, unincorporated association, state or local government, and any agency, instrumentality, or subdivision of such a government.

(p) *Prime contractor* means any person holding a contract with a contracting agency.

(q) *Secretary* means the Secretary of Labor, U.S. Department of Labor, or his or her designee.

§ 270.2 Statement of Policy.

(a) It is the policy of the Executive Branch of the Federal Government that in procuring goods and services, in order to ensure the economical and efficient administration and completion of contracts, contracting agencies shall not contract with employers that permanently replace lawfully striking employees.

(b) All discretion under the Order and this part shall be exercised consistent with this policy.

(c) The Order and this part apply only to contracts in excess of the Simplified Acquisition Threshold of \$100,000 established in section 4(11) of the Office of Federal Procurement Policy Act, 41 U.S.C. 403(11).

Subpart B—Enforcement

§ 270.10 Complaints.

(a) Complaints may be filed by an employee of an organizational unit of a

federal contractor, or his or her representative, alleging that the organizational unit has permanently replaced lawfully striking employees. All complaints should be filed with the Deputy Assistant Secretary for Labor-Management Programs, Office of the American Workplace, U.S. Department of Labor, 200 Constitution Avenue NW., Room S-2203, Washington, DC 20210.

(b) The complaint must be in writing and should include the name, address, and telephone number of the complainant, the name and address of the organizational unit of the federal contractor alleged to have permanently replaced lawfully striking employees, an identification of the lawfully striking employees who were allegedly permanently replaced, and any other pertinent information which will assist in the investigation and resolution of the complaint.

§ 270.11 Investigations.

The Deputy Assistant Secretary may cause an investigation to be conducted of an organizational unit of a federal contractor, regarding the permanent replacement of lawfully striking employees, on the basis of complaints filed with the Department, information submitted by other persons, or other available information. The Deputy Assistant Secretary shall notify the organizational unit of a federal contractor of the initiation of an investigation and the potential consequences under the Order. The Deputy Assistant Secretary may also cause a fact finding hearing to be conducted, either instead of or in addition to an investigation. The Deputy Assistant Secretary shall transmit the record, including a proposed finding of fact and a recommendation as to debarment and/or termination of a contract or contracts, to the Assistant Secretary.

§ 270.12 Findings by the Assistant Secretary.

(a) Upon receipt of the record, the Assistant Secretary shall make a finding as to whether the organizational unit of the federal contractor has permanently replaced lawfully striking employees.

(b) If the Assistant Secretary finds that the organizational unit of the federal contractor has permanently replaced lawfully striking employees, he or she shall determine whether it is appropriate to propose debarment.

(c) If the Assistant Secretary finds that the organizational unit of the federal contractor has permanently replaced lawfully striking employees after March 8, 1995, the effective date of the Order, he or she shall also determine whether

it is appropriate to propose termination for convenience of the contract or contracts of the organizational unit.

(d) If the Assistant Secretary proposes debarment and/or termination, he or she shall send the organizational unit a notice of proposed debarment and/or termination by certified mail, return receipt requested, advising the organizational unit of its right, within 15 days after receipt of the notice, to submit, in person, in writing, or through a representative, information and argument in opposition to debarment and/or termination.

§ 270.13 Hearings.

(a) If the Assistant Secretary finds that the submission by the organizational unit of a federal contractor in opposition to the proposed debarment and/or termination raises a genuine dispute over facts material to the proposed debarment and/or termination, the Assistant Secretary shall afford the organizational unit the opportunity to appear at an informal hearing. The Assistant Secretary or his or her designee shall preside over the proceeding.

(b) The Assistant Secretary shall make a decision on the proposed debarment and/or termination of a contract or contract based on the record.

§ 270.14 Termination of contract for convenience.

(a) Upon finding that termination of a contract or contracts for convenience is appropriate, the Assistant Secretary shall notify the organizational unit of a federal contractor by certified mail, return receipt requested, and shall transmit that finding to the head of any department or agency that contracts with the organizational unit.

(b) The head of the department or agency shall notify the Assistant Secretary in writing of those contracts that have been terminated for convenience pursuant to the Assistant Secretary's finding.

(c) If the head of the department or agency objects to the termination for convenience of a contract, he or she shall notify the Assistant Secretary in writing, promptly after receipt of the Assistant Secretary's finding, of the reasons for not terminating the contract and the termination for convenience shall not be issued.

§ 270.15 Debarment.

(a) The scope of any debarment normally will be limited to the organizational unit of a federal contractor that the Assistant Secretary

has found to have permanently replaced lawfully striking employees.

(b) Upon finding that debarment is appropriate, the Assistant Secretary shall promptly notify the organizational unit of the federal contractor by certified mail, return receipt requested. The notice shall advise the organizational unit of the federal contractor:

(1) Of the effective date of the debarment;

(2) That the debarment will not extend beyond the date when the labor dispute precipitating the permanent replacement of lawfully striking employees has been resolved, as determined by the Assistant Secretary in accordance with § 270.16;

(3) That under the debarment, contracting agencies throughout the executive branch of the Government shall not contract or consent to subcontracts with the organizational unit of the federal contractor nor renew or otherwise extend the duration of current contracts, unless the head of a contracting agency or his or her designee determines that there is a compelling reason for such action.

(c) The Assistant Secretary shall notify the Administrator of the General Services Administration of the debarment and the Administrator shall include the contractor on the list of debarred contractors. The Assistant Secretary shall publish or cause to be published in the **Federal Register**, the names of contractors that have, in the judgment of the Assistant Secretary, permanently replaced lawfully striking employees and have been the subject of debarment. Departments and agencies shall not renew or otherwise extend the duration of current contracts or solicit offers from, award contracts to, or consent to subcontracts with these contractors unless the head of the agency or his or her designee determines, in writing, that there is a compelling reason for such action.

§ 270.16 Determination of Resolution of Labor Dispute.

(a) The Assistant Secretary may cause an investigation to be conducted, on his or her own initiative or upon request by any person, to determine whether a labor dispute that resulted in debarment has been resolved. Among the factors or conditions that the Assistant Secretary may consider are:

(1) Whether the parties to the labor dispute have either reached a formal settlement or agreed on a procedure for resolving their differences;

(2) Whether the parties have agreed informally to end the labor dispute

without the signing of a written agreement;

(3) Whether striking employees have returned to work;

(4) Any other relevant factors tending to lead to the conclusion that the labor dispute has ended.

(b) If the Assistant Secretary determines that the labor dispute has been resolved, he or she shall terminate the debarment and notify the public, federal agencies, federal contractors, and other interested persons, through publication in the **Federal Register** or otherwise, of this action.

Subpart C—Ancillary Matters

§ 270.20 Cooperation with the Assistant Secretary.

Consistent with section 7 of the Order, each contracting agency shall cooperate with the Assistant Secretary and provide such information and assistance as the Assistant Secretary may require in the performance of the Assistant Secretary's functions under the Order and the regulations in this part.

§ 270.21 Rulings and interpretations.

Rulings under or interpretations of the Order or the regulations contained in this part shall be made by the Assistant Secretary or his or her designee.

§ 270.22 Delegation of Authority by the Secretary.

Consistent with section 8 of the Order, the Secretary may delegate any function or duty of the Secretary under this Order to any officer in the Department or to any other officer in the executive branch of the Government, with the consent of the head of the department or agency in which that officer serves.

§ 270.23 General.

(a) The regulations in this part implement Executive Order 12954 only and do not modify or affect the interpretation of any other Department of Labor regulations or policy.

(b) Consistent with section 10 of the Order, nothing contained in the Order or this part, or promulgated pursuant to the Order or this part, is intended to confer any substantive or procedural right, benefit, or privilege enforceable at law by a party against the United States, its agencies or instrumentalities, its officers, or its employees.

[FR Doc. 95-7732 Filed 3-24-95; 4:09 pm]

BILLING CODE 4510-86-P